In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 997

S. MONTAGUE STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after a jury trial, of having wilfully attempted to evade his income tax for the years 1962, 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code. He was sentenced to four months on count one (not four *years*, as the petition states (Pet. 3)) and to three years' concurrent probation on counts two and three (R. 389-390). The court of appeals affirmed, and denied a petition for rehearing on October 21, 1970 (Pet. 2). The peti-

tion for a writ of certiorari was filed on November 23, 1970, and is thus out of time under Rule 22(2). In any event, the contentions presented in the petition are plainly without merit.

Petitioner was a practicing physician during the years in issue. His tax returns were prepared by a certified public accountant from records furnished by petitioner or his wife, which purportedly contained complete and accurate information (R. 40-41, 44-46, 48, 50-51). Petitioner destroyed all those materials and thus they were not available to document petitioner's returns (R. 263, 264). Accordingly the government reconstructed petitioner's income using the net worth-expenditures method, which established that petitioner had substantially understated his income for the years involved (R. 228, 231-232).

Petitioner asserts (Pet. 8-9) that he was entitled to an acquittal as a matter of law because he relied upon his accountants to prepare accurate returns. But the government's evidence tended to show that petitioner was not making a full, fair disclosure to his accountant, and the jury agreed with this view of the matter. In these circumstances, petitioner was not entitled to acquittal merely because he did not prepare the returns himself.

Nor is there substance to the argument (Pet. 10) that the trial judge committed plain error by asking one question which allegedly indicated he believed petitioner was guilty. The question (Pet. 7) does not, in context, justify any such inference; as the court below concluded (Pet. App. 11), it simply sought an answer responsive to the cross-examination.

Moreover, the asserted "comment" by the judge was so innocuous that petitioner did not object to it until the appeal. In these circumstances, the court below properly found no plain error within the reach of Rule 52(b), Federal Rules of Criminal Procedure.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 412102 400